

NTSB Order No. EA-4068

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of January, 1994

Respondent .

Docket SE-12311

Respondent, pro se, has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on June 3, 1992, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 180 days.² The law

²Respondent was represented by counsel at the hearing.

judge found, as the Administrator had alleged, that respondent had violated 14 C.F.R. 135.117(a)(2), (a)(4), and (a)(5), 91.119(c), and 91.13(a).³ We deny the appeal. The law judge thoroughly analyzed and weighed the evidence, and correctly discussed and applied Board precedent.

Respondent was the pilot in command of a June 2, 1991 passenger carrying, Part 135 scheduled seaplane flight operated

³Subsections (a)(2), (a)(4), and (a)(5) of Federal Aviation Regulation 135.117, Briefing of passengers before flight, read:

(a) Before each takeoff each pilot in command of an aircraft carrying passengers shall ensure that all passengers have been orally briefed on -

(2) The use of safety belts, including instructions on how to fasten and unfasten the safety belts. Each passenger shall be briefed on when, where, and under what conditions the safety belt must be fastened about that passenger. This briefing shall include a statement that the Federal Aviation Regulations require passenger compliance with lighted passenger information signs and crewmember instructions concerning the use of safety belts.

(4) Location and means for opening the passenger entry door and emergency exits;

(5) Location of survival equipment [.]

§ 91.119(c), Minimum safe altitudes; General, reads:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.13(a) reads:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

by Lake Union Air Service from Friday Harbor, WA.⁴ On takeoff, the aircraft crashed into a tugboat and sank. The six passengers were rescued by nearby boaters.

After hearing testimony from, among others, respondent and four other percipient witnesses offered by the Administrator (two of whom were passengers on the flight), the law judge found that respondent had attempted a takeoff "essentially in a southerly direction with a strong crosswind component from the southwest to west." Tr. at 223. The law judge found, in part (Tr. at 230):

Here the departure was a choice made by the Respondent. He knew, as the evidence appears to me, that he had a crosswind. He knew the strength of the crosswind. He knew or should have known what was out in front of him. If he looked out the front end of the aircraft, the tugboat was there. . . . [T]here was no reason why the aircraft could not have been taxied further north and taken off . . . That would have been the more prudent and reasonable thing.

Based on testimony from the two passengers, the law judge also concluded that, prior to the attempted takeoff, respondent had not ensured that all passengers had been briefed, as § 135.117(a) required. The law judge specifically found that "there was either an attempt at a briefing or a briefing which was not clearly heard . . . or a briefing which included only a limited number of items But there was no explanation as to how any of this was to be used. . . ." Tr. at 223-224.

Although respondent here argues that he did give a total preflight briefing, nothing in his appeal gives us reason to overturn the law judge's ruling. The passengers' testimony

⁴The aircraft was a DeHavilland DHC-2, known as a Beaver.

supports the law judge's ruling (see, e.g., Tr. at 55, 64-65, and Exhibit R-1), and we have no basis to overturn the law judge's rejection of respondent's testimony that he gave a full briefing, as that rejection is premised on the law judge's credibility assessment of respondent and the other witnesses.⁵

The law judge also found that respondent violated § 91.119(c). He thoroughly discussed (Tr. at 225-227) the regulatory exception for takeoffs and landings, paying special attention to the requirement that operations closer than 500 feet to objects be "necessary for" those takeoffs and landings. The law judge concisely explained that respondent's takeoff so close to numerous other craft in the water, with the crosswind, and outside the operating limits of the aircraft⁶ was not necessary for the takeoff, in the sense that word is logically understood in the regulation.⁷ That is, although it is entirely possible and perhaps likely that some landings and takeoffs at Friday Harbor on June 2, 1992 would necessitate operating within 500

⁵Respondent attacks the credibility of witness Saude on the grounds that Mr. Saude used the words "escape hatches" and respondent arguably never used that phrase. The transcript (at 64) indicates that Mr. Saude actually testified that respondent had said "side windows are for escape hatches, or words to that effect." Mr. Saude, thus, did not testify that respondent used the words "escape hatches."

On another credibility matter, we note that the law judge was aware that the passenger-witnesses had claims pending against Lake Union's insurer. Thus, any bias they might have was incorporated in the law judge's thinking.

⁶Tr. at 109, 131.

⁷Another Lake Union seaplane had just taken off without incident using a different heading.

feet of objects (given the apparent congestion there), respondent could not simply choose any takeoff route or time and call it necessary. He must make a reasonable, appropriate choice, or the regulation has no meaning. Administrator v. Lewis & Lewis, 3 NTSB 878 (1978). We, thus, reject respondent's contention that the rule does not apply simply because he was conducting a takeoff.⁸

In reaching his conclusions, the law judge made various subsidiary findings of fact regarding the position of respondent's aircraft and weather conditions at the time of takeoff. Respondent also challenges the law judge's reliance, in making these findings, on the testimony of two percipient witnesses. Mike Reekie, an eyewitness who watched from a nearby boat; and Mike Taylor, a seaplane pilot who was preparing to takeoff at the time, saw respondent's departure, and flew over the accident site immediately after it occurred. Respondent believes that their testimony regarding wind conditions was inconsistent and unreliable.⁹

We have thoroughly reviewed the evidence and find no error in the law judge's reliance on eyewitness testimony offered by the Administrator, especially the testimony of the two witnesses

⁸At the hearing, respondent also argued that a strong, unexpected gust of wind created an emergency that excuses the violation. As the law judge noted, however, respondent may not avail himself of this defense when the emergency is of his own making in his improvident takeoff.

⁹Respondent argues that each of the Administrator's witnesses placed his takeoff at a different location in the harbor.

respondent cites, as there is no indication they were anything but disinterested observers with no connection to any of the interested parties.¹⁰ Although the testimony of all the Administrator's eyewitnesses is not identical, it is sufficiently similar to be reliable, and is not substantially different from respondent's testimony.¹¹

Respondent also believes that the law judge improperly considered a statement by Judy Ward, who did not testify but was on Mr. Reekie's boat and whose statement at the time -- that respondent was not going to clear the tugboat -- was repeated by Mr. Reekie at the hearing. We can find no abuse of the law judge's discretion in his allowing Mr. Reekie's repetition of her statement.

Finally, in response to respondent's claim that he was not reckless or careless, we note that the § 91.13(a) finding of carelessness does not increase the sanction and required no separate proof, as it can be residual to the operational violation. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at n. 17, and cases cited there. Here, moreover, the law judge

¹⁰In addition, Mr. Taylor is an experienced seaplane pilot, and both are very familiar with Friday Harbor.

¹¹At the hearing, respondent did not seriously disagree with the record testimony regarding wind direction and speed or takeoff route. See initial decision finding at 227. Compare, e.g., Exhibits C-2K (respondent's diagram of his route and prevailing wind) with C-2T (Mr. Taylor's diagram) and C-2R (Mr. Reekie's diagram). All the diagrams indicate wind coming from the southwest and west and indicate the same general area of takeoff. Respondent's testimony regarding wind speed (Tr. at 83) is also similar to that of Mr. Taylor. Tr. at 90.

found (and respondent does not directly disagree) that there was actual endangerment of the passengers and damage to property.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 180-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.¹²

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

¹²For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).